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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 345

SWORD LINE, INC.,
Plaintiff-Petitioner,

v.

UNITED STATES OF AMERICA,
Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Sword Line, Inc. a Delaware corporation with its principal office in New York City, prays that a writ of certiorari issue to review the Order of the United States Court of Claims which became final on May 17, 1957 (R. p. 81).

The decision below stands firmly on the basis that the United States Court of Claims is bound by a prior adjudication of the Supreme Court of the United States, *Sword Line, Inc.* v. *United States*, 351 U. S. 976, affecting the same parties, and that it is not for the United States Court of Claims to pass upon either the correctness or the validity of such prior adjudication regardless of how earnestly the petitioner challenges its correctness and validity.

The United States Court of Claims rendered its decision against the plaintiff and in favor of the defendant, on the

authority of *Sword Line, Inc.* v. *United States*, 351 U. S. 976, which authority, however, as shown hereinafter, is *coram non judice*. In rendering that decision the United States Supreme Court granted Sword Line's petition for certiorari but foreclosed Sword Line, Inc. from a hearing, thereby precluding any application in that case for a rehearing or for a re-argument. Nevertheless, a void decision can never be other than void, and it will always be open to attack. The Supreme Court affirmed *Sword Line, Inc.* v. *United States*, 230 Fed. 2nd 75, which adjudication likewise was *coram non judice*. Neither the Court of Appeals, Second Circuit, nor the District Court, Southern District of New York, ever had jurisdiction to render any adjudication in *Sword Line, Inc.* v. *United States*. The adjudications were rendered without jurisdiction of the subject matter and they have no validity.

The prior adjudications were all rendered without any consideration of the change of policy of the law proclaimed by Congress in 1936 (Merchant Marine Act of 1936) and again in 1946 (Merchant Ship Sales Act of 1946), when Congress established a privately owned and operated merchant marine and required the United States to contract in the manner of a private corporation, thereby rendering the *Suits in Admiralty Act* (Title 46 U. S. C. Sec. 741 et seq.) inapplicable to the subject matter involved in the case at bar, and thereby taking back the jurisdiction from the United States District Court and restoring it to the Court of Claims.

Opinion Below

The United States Court of Claims rendered no opinion. The final order (R. p. 81) merely states that on the authority of *Sword Line, Inc.* v. *United States*, 351 U. S. 976, defendant's motion to dismiss plaintiff's petition on

grounds that the Court of Claims lacks jurisdiction of the subject matter, is granted and plaintiff's petition is dismissed.

Jurisdiction

The United States Court of Claims enfered its final order on May 17, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1), 28 U. S. C. Sec. 2101 (c), 28 U. S. C. Sec. 2106 and 28 U. S. C. Sec. 1491 (2); also under *Constitution of the United States*, Art. III, Sec. 2, Cl. 2.

Principal Questions Presented

1. Can a prior adjudication be permitted to continue as an authority when it is obvious that the court making such adjudication lacked any jurisdiction to make it?

2. Can the United States assert any of the sovereign privileges and immunities which it enjoys under the *Suits in Admiralty Act* when it conducts its business in the manner of a private corporation? Is not sovereign immunity lost when the United States makes a contract in the manner of a private corporation?

3. When Congress changed the policy of the law by enacting the *Merchant Marine Act of 1936* and the *Merchant Ship Sales Act of 1946*, requiring the merchant marine to be privately owned and operated, and directing the Maritime Commission to enter into contracts in the manner of a private corporation, did not Congress restore to the United States Court of Claims certain jurisdiction which immediately after 1920 the *Suits in Admiralty Act* of 1920 was considered to have taken from it?

4. Is not the *Suits in Admiralty Act* an assertion of sovereignty? And are not the *Merchant Marine Act of*

1936 and the *Merchant Ship Sales Act of 1946* a disavowal of sovereignty?

5. Inasmuch as the *Suits in Admiralty Act* by its own express language is limited in its application to vessels which are sovereign-owned and operated (and not privately owned and operated), can the United States invoke the privileges and immunities which it enjoys as a sovereign under the *Suits in Admiralty Act* in a case where it has made a contract in the manner of a private corporation with a citizen of the United States under statutes which established a merchant marine that is privately owned and operated?

6. When the United States divests itself of its sovereign status and makes a contract in the manner of a private corporation does not the United States thereby also free the subject matter of the contract from the privileges and immunities of sovereignty? When the United States charters its vessels in the manner of a private corporation does not the United States thereby release the vessels from all sovereign immunities and by so doing cause the vessels to assume the status of being privately owned?

7. May a libel under the *Suits in Admiralty Act*, the language of which expressly limits its application to vessels which are sovereign owned and operated be maintained by plaintiff for the refund of unlawful overcharges of charter hire in a case where the United States has pursued the new and changed policy of law proclaimed by Congress and has dealt exclusively in the manner of a private corporation, the subject matter being vessels which are, or are intended to be, exclusively privately owned or operated within the policy of the *Merchant Ship Sales Act of 1946*, Title 50 U. S. C. App. Sec. 1735, 1738(c).

8. If heretofore, in all the leading cases in the United States Supreme Court dealing with unjust enrichment,

money had and received, indebitatus assumpsit or quasi-contract, where there was a maritime contract between the parties, and the Court heretofore invariably ruled that admiralty has jurisdiction provided that the unjust enrichment arose as a result of the breach of the maritime contract, does it not follow that it is the law of the United States that there must be a breach of the maritime contract before admiralty can have jurisdiction of the case?

9. Where a maritime contract is fully performed and all its terms are faithfully carried out without a breach on the part of either party to the contract, can the income from such maritime contract be described as anything other than *just* enrichment? And if it is found that such *just* enrichment from a maritime contract also violates a law, is it not correct to say that the income still continues to be just enrichment from a maritime contract while at the same time it is unjust enrichment from a violation of law? Is it not imperative that before it can be said that a libel alleges unjust enrichment from a maritime contract it must definitely appear that the libel alleges a breach of the maritime contract, as a result of which breach the unjust enrichment arose? Did not the United States Supreme Court so hold in *Archawski* v. *Hancoti*, 350 U. S. 532?

Statutes Involved

Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, 46 U. S. C. 741 *et seq.*, as amended December 13, 1950, provides in pertinent parts as follows:

> "Section 741. *Exemption of United States vessels and cargoes from arrest or seizure.*—No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or

in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: Provided, That this chapter shall not apply to the Panama Railroad Company. (Mar. 9, 1920, c. 95, sec. 1, 41 Stat. 525.)"

"Section 742. *Libel in personam.*—In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them reside or have their principal place of business in the United States or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against

the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States. (Mar. 9, 1920, c. 95, sec. 2, 41 Stat. 525.)

"Section 745. Suits as authorized by this chapter shall be brought only within two years after the cause of action arises * * *."

Merchant Marine Act of 1936 (49 Stat. 1985, 46 U. S. C. 1101 *et seq.*), as amended provides in pertinent parts as follows:

"DECLARATION OF POLICY

"Section 1101. *Fostering development and maintenance of merchant marine.* It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States in so far as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and

encourage the maintenance of such a merchant marine." (June 29, 1936, c. 858, Title I, sec. 101, 49 Stat. 1985.)

"Section 1117. *Power to contract; audit of accounts; reports of departure of Commission from provisions of chapter.*—The Commission may enter into such contracts, upon behalf of the United States, as may in its discretion, be necessary to carry on the activities authorized by this Act [chapter], in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. All the Commission's financial transactions shall be audited in the General Accounting Office according to approved commercial practice as provided in the Act of March 20, 1922 (42 Stat. 444): Provided, That it shall be recognized that, because of the business activities authorized by this Act [chapter], the accounting officers shall allow credit for all expenditures shown to be necessary because of the nature of such authorized activities notwithstanding any existing statutory provision to the contrary. The Comptroller General shall report annually or oftener to Congress any departure by the Commission from the provisions of this Act [chapter]. (June 29, 1936, c. 858, Title II, sec. 207, 49 Stat. 1988.)"

"Section 207 (49 Stat. 1985). *Power to Make Contracts.*—The Commission may enter into such contracts, upon behalf of the United States, as may, in its discretion, be necessary to carry on the activities authorized by this Act, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter."

"Section 1199. *Excess profit; payment to Commission; formula for determining profit.*—(a) Every charter made by the Commission pursuant to the provisions of this title [secs. 1191 to 1204 of this title] shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: Provided, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years."

Merchant Ship Sales Act of 1946, 60 Stat. 41, 50 U. S. C. App. 1735 *et seq.*, provides in pertinent parts as follows:

"DECLARATION OF POLICY

"Section 1735 (a). It is necessary for the national security and development and maintenance of the domestic and the export and import foreign commerce of the United States that the United States have an efficient and adequate American-owned merchant marine (1) sufficient to carry its domestic water-borne commerce and a substantial portion of its water-borne export and import foreign commerce and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all

times; (2) capable of serving as a naval and military auxiliary in time of war or national emergency; (3) owned and operated under the United States flag by citizens of the United States; (4) composed of the best equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel; and (5) supplemented by efficient American-owned facilities for shipbuilding and ship repair, marine insurance, and other auxiliary services."

"Section 1735 (b). It is hereby declared to be the policy of this Act to foster the development and encourage the maintenance of such a merchant marine."

"Section 1738 (c). The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section."

Statement of the Case

The petition of the plaintiff (R. pp. 1-11) filed in the United States Court of Claims January 9, 1956, seeks to recover a refund of overcharges of charter hire in the total amount of $1,727,253.28 which was exacted and received by the defendant in violation of law, specifically in violation of Section 709 of the *Merchant Marine Act of 1936* (Title 46, U. S. C. Section 1199) and in violation of section 5 of the *Merchant Ship Sales Act of 1946* (Title 50 U. S. C. App. Section 1735 et seq., 60 Stat. 43). The petition sets forth that the plaintiff and defendant entered into a contract and conducted operations thereunder for more than two years in accordance with the chartering

program authorized by the *Merchant Ship Sales Act of 1946* (Title 50 U. S. C. App. Sections 1737, 1738), and in keeping with the change in the policy of the law as proclaimed by Congress in the *Merchant Marine Act of 1936* (Title 46, U. S. C. Sec. 1101), and the *Merchant Ship Sales Act of 1946* (Title 50 U. S. C. App. Sec. 1735) to establish a privately owned and operated merchant marine, the said contract being made and entered into by the United States acting in the manner of a private corporation (Title 46, U. S. C. Section 1101 and 1117, originally 49 Stat. 1985 Section 207; Title 50 U. S. C. App. Sec. 1745(d)).

The petition alleges no breach of the contract between the plaintiff and the defendant, on the contrary, the allegations as set forth in the petition show that the contract was fully performed by both parties thereto in accordance with its terms. The refund sued for in the petition, in the sum of $1,727,253.28, is an indebtedness which did not arise as a result of any breach of the contract, but as alleged in the petition, was the result of a violation of, and contrary to, Section 709 of the *Merchant Marine Act of 1936*, Section 5 of the *Merchant Ship Sales Act of 1946*, and applicable regulations. The petition shows clearly that all payments made by the plaintiff to the defendant were entirely in accordance with the provisions of the contract and in full compliance with its terms, and as far as the contract is concerned, the receipt of all payments by the defendant was just. There was no unjust enrichment from the contract, and none is alleged. There was money unjustly had and received, resulting from a violation of the applicable statute, and such is alleged.

The defendant filed no answer to the petition, but moved for its dismissal on the ground that plaintiff's claim is maritime in nature and within the exclusive jurisdiction of the plaintiff's local admiralty court, pursuant to the *Suits in Admiralty Act*, by reason of which the jurisdic-

tion of the Court of Claims has been withdrawn (R. p. 13). The defendant's motion characterizes the plaintiff's claim as being in maritime quasi-contract, which the plaintiff emphatically disavows, there being no sound legal foundation for the fiction of quasi-contract, nor for the abstruse learning which has been devoted to that fictitious subject in some judicial opinions. The plaintiff neither alleges nor relies on the undefinable, illogical and nebulous theory of quasi-contract. The Court of Appeals, Second Circuit, injected "quasi-contract" into the case.

The defendant's motion to dismiss the petition, and the authorities cited in the notice of motion, upon which the defendant relies, all overlook the fact that Congress made a change in the policy of the law whereby the *Suits in Admiralty Act* is not applicable to the subject matter of the petition, and that the jurisdiction erstwhile considered to have been withdrawn from the Court of Claims has been restored. By the *Merchant Marine Act of 1936* (Title 46 U. S. C. Sec. 1101) and the *Merchant Ship Sales Act of* 1946 (Title 50 U. S. C. App. Sec. 1735) Congress made it the policy of the United States to have a merchant marine which is privately owned and operated and Congress decreed that the contracts made for chartering the vessels for such privately owned and operated merchant marine shall be made by the United States acting in the manner of a private corporation (46 U. S. C. Sec. 1117, originally 49 Stat. 1985, Sec. 207; Title 50, U. S. C. App. Sec. 1745(d)). The defendant's motion and the defendant's cited authorities, including *Sword Line, Inc.* v. *United States*, 351 U. S. 976, all overlooked the fact that by such legislative mandate Congress waived all sovereign immunity and rendered inoperative the *Suits in Admiralty Act* which is applicable only to sovereign owned and operated vessels, and that thereby Congress restored to the Court of Claims the erstwhile withdrawn jurisdiction.

Reasons for Granting the Writ

1. *The ruling of the Court of Claims, to the effect that it lacks jurisdiction, is compelled by the adjudication of Sword Line, Inc.* v. *United States, 351 U. S. 976, which latter is a void and invalid adjudication and should be expunged.*

Prior to 1920, the law applicable to vessels made no distinction between vessels which were privately owned and operated and those which were sovereign owned and operated, and at that time the United States Court of Claims possessed jurisdiction over claims against the United States involving sovereign owned and operated vessels, and there was no special applicable statute of limitations. In 1920 Congress made a change in the policy of the law by enacting the *Suits in Admiralty Act*, which gave the United States District Courts, sitting in admiralty, the exclusive jurisdiction over suits involving sovereign owned and operated vessels, and said *Suits in Admiralty Act* established a special sovereign two-year statute of limitations for filing libels *in personam* against the United States. By virtue of such enactment the United States Supreme Court made rulings in 1928, 1930 and 1932 to the effect that all jurisdiction was withdrawn from the Court of Claims with respect to claims involving sovereign owned and operated vessels (See *Fleet Corporation* v. *Rosenberg Bros.* (1928), 276 U. S. 202; *Johnson* v. *Fleet Corporation* (1930), 280 U. S. 320; *Matson Navigation Co.* v. *United States* (1932), 284 U. S. 352).

Thereafter, in 1936, Congress made a new and drastic change in the policy of the law by enacting the *Merchant Marine Act of 1936* which established a merchant marine of privately owned and operated vessels (46 U. S. C. Sec. 1101, 49 Stat. 1985); and in fostering the development and

maintenance of such a privately owned and operated merchant marine Congress directed all contracts of the United States to be made in the manner of a private corporation (46 U. S. C. Sec. 1117, originally 49 Stat. 1985 Sec. 207).

The said drastic change in the policy of the law was confirmed and re-enacted by Congress when it passed the *Merchant Ship Sales Act of 1946* (Chap. 82, 60 Stat. 41, 50 U. S. C. App. 1735 et seq.), in which Congress re-iterated and re-affirmed the new policy of fostering and encouraging the operation and maintenance of an American merchant marine, privately owned and operated, and conducted by American citizens (50 U. S. C. App. Sec. 1735), and in which Congress specifically made the provisions of the *Merchant Marine Act of 1936* applicable to said *Merchant Ship Sales Act of 1946*, including the provisions that all contracts thereunder shall be made by the United States in the manner of a private corporation (50 U. S. C. App. Sec. 1745(d)).

The express language of the *Suits in Admiralty Act* compels it to be limited in its application to vessels which are sovereign owned and operated. The Act cannot apply to vessels which are privately owned and operated. Section 1 of the *Suits in Admiralty Act* specifies that the vessels to which the Act applies are those owned by the United States (46 U. S. C. Sec. 741). Section 2 of the *Suits in Admiralty Act* (1920, 41 Stat. 525, Sec. 2; 46 U. S. C. Sec. 742) provides that it shall apply only in situations where a proceeding in admiralty could be maintained, if at the time of the commencement of the action "such vessel were privately owned or operated". The inescapable implication which that language conveys is that the vessels to which the *Suits in Admiralty Act* applies are not privately owned and operated. Every provision of the *Suits in Admiralty Act* carries with it the unquestioned meaning

that the vessel to which it applies must be sovereign owned and operated.

The change of policy which was enacted by Congress in 1936 (*Merchant Marine Act of 1936*, 46 U. S. C. Secs. 1101, 1117) and re-affirmed by Congress in 1946 (*Merchant Ship Sales Act of 1946*, 50 U. S. C. App. Secs. 1735, 1745(d)) was that thereafter the United States merchant marine shall be privately owned and operated and that all contracts made with respect to such merchant vessels shall be entered into by the United States in the manner of a private corporation. That change of policy was ignored and disregarded by the United States Court of Appeals, Second Circuit, when it ruled in *Sword Line, Inc.* v. *United States*, 230 Fed. 2d 75, 78, "that the action was properly brought in admiralty but that it must fail because of the running of the two-year statute of limitations" established by the *Suits in Admiralty Act*. In the petition for certiorari, which ensued after said ruling, it was indicated that such ruling was a usurpation of jurisdiction, nevertheless it is that ruling which the United Supreme Court affirmed in 351 U. S. 976 after it granted certiorari limited to the question of whether admiralty had jurisdiction over the controversy stated in the libel and foreclosed a hearing on that very question. Such affirmance is open to collateral attack, because the adjudication is void.

The subject matter of the contract over which the controversy rages is "privately owned and operated vessels" over which the *Suits in Admiralty Act* cannot possibly give jurisdiction, because that Act is applicable only to sovereign owned and operated vessels. The very contract between the parties was made by the United States in the manner of a private corporation. When the United States contracts as a private corporation the vessels involved in the contract must necessarily be privately owned

and operated, because the United States cannot divest itself of its sovereign status and make a contract in the manner of a private corporation without also freeing the subject matter of the contract from the characteristics and immunities of sovereignty. The *Suits in Admiralty Act* is not applicable when vessels are privately owned and operated. When the United States acts as a private corporation, sovereign immunity is not favored (See *Dollar* v. *Land*; 154 Fed. 2d 307 at page 312).

The wholly inadequate two-year limitation period inserted into the *Suits in Admiralty Act* is definitely an assertion of sovereign immunity from suit. It is a complete immunity from the equitable principles of laches inherent in admiralty jurisdiction. In world-wide water transactions it usually takes more than two years to ascertain whether there is a cause of action, and a suit cannot be instituted until it is known that a cause of action exists. The two year period for suit is practically equivalent to no consent at all to be sued. Admiralty applies the equitable doctrine of laches to the peculiar equitable circumstances of each case, and proceeds on general principles of equity and fair dealing. Admiralty cannot do justice when it is forced to proceed otherwise. When inhibited by an invalid two-year limitation, equitable admiralty cannot do equity.

The rulings heretofore made in admiralty in the controversy between Sword Line, Inc. and the United States were made entirely without jurisdiction of the subject matter before the Court, and accordingly said rulings have no validity whatsoever. Admiralty cannot possibly acquire jurisdiction through the *Suits in Admiralty Act*, with its sovereign immunity of a two-year statute of limitations, when the United States has made a contract in the manner of a private corporation concerning vessels which are privately owned and operated.

The present application for a writ of certiorari is not the attempt of an aggrieved litigant to attack a ruling indirectly after it can no longer do so directly. If the Admiralty Court had had jurisdiction of the subject matter and its ruling was erroneous, that would not make its judgment void, but merely open to reversal in an appropriate and timely appellate proceeding, and until so reversed it would be an effective and conclusive adjudication. That is not the situation here. In the *Sword Line* case the admiralty court never had, and never could have, jurisdiction of the subject matter of the controversy. Lacking jurisdiction of the subject matter the Court's adjudication is absolutely void and of no validity.

Even though it was the petitioner itself which originally filed the libel in admiralty, the petitioner by so doing, could not give the Court jurisdiction of the subject matter. It is completely beyond the power of a litigant to bestow upon a court jurisdiction which it does not and cannot possess.

The record of the case now before this Court shows that in its motion before the Court of Claims the United States moved on the authority of *Sword Line, Inc.* v. *United States*, 230 Fed. 2d. 75 (R. p. 13), for a dismissal of the plaintiff's petition on the ground that the Court of Claims lacks jurisdiction of the subject matter, because the United States is under the false impression that the plaintiff's claim is within the exclusive jurisdiction of the admiralty court, pursuant to the *Suits in Admiralty Act*. As the United States claims the benefit of the cited ruling and relies on it, the petitioner is well within its rights in attacking such ruling. The law was clearly laid down by the United States Supreme Court in the early case of *Elliot et al* v. *Peirsol et al*, 26 U. S. 328, 1 Peters 328, in which Associate Justice Trimble wrote at page 340 as follows:

> "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void. * * * This distinction runs through all the cases on the subject; and it proves that the jurisdiction of any court exercising authority over a subject, may be inquired into in every court, when the proceedings of the former are relied on and brought before the latter, by the party claiming the benefit of such proceedings."

To the same effect the United States Supreme Court set forth the law in *Williamson* v. *Berry*, 49 U. S. 495, 8 Howard 495, where at page 539, Mr. Justice Wayne wrote:

> "We concur that neither orders nor decrees in chancery can be reviewed as a whole in a collateral way. But it is an equally well settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings. The rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of states."

The jurisdictional question at bar relates to jurisdiction over the subject matter, not jurisdiction over the parties.

The adjudication in *Sword Line, Inc.* v. *United States*, 351 U. S. 976, having been rendered without jurisdiction of the subject matter, is a nullity and may be declared such, collaterally. In *Voorhees* v. *Bank*, 35 U. S. 449 at page 474, Mr. Justice Baldwin wrote:

> "The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case it is a record importing absolute verity; in the other mere waste paper."

The United States relies upon the adjudications of the court sitting in admiralty, and they were rendered clearly through the usurpation of jurisdiction which the court cannot possess or acquire. The adjudications in *Sword Line, Inc.* v. *United States*, 134 Fed. Supp. 631, 228 Fed. 2d 344, 230 Fed. 2d. 75 and 351 U. S. 976, should be declared nullities and expunged.

2. *The utter disregard of the legislative mandate, as evidenced by the decision of Sword Line, Inc.* v. *United States, 351 U. S. 976, should be rectified. A change of policy in the law as proclaimed by Congress cannot be ignored; it must be recognized by the courts and carried into effect.*

Both the *Merchant Marine Act of 1936* (46 U. S. C. Sec. 1101) and the *Merchant Ship Sales Act of 1946* (50 U. S. C. App. Sec. 1735) bear the caption at the very beginning in these words: "DECLARATION OF POLICY". And in the text of each of said opening sections we find these words:

"It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine."

The kind of merchant marine referred to in the *Merchant Marine Act of 1936*, Title 46 Sec. 1101 is one "owned and operated by citizens of the United States insofar as may be practicable". In the 1946 statute, the *Merchant Ship Sales Act of 1946*, Title 50 U. S. C. App. Sec. 1735 (a), the kind of merchant marine referred to is one "owned and operated by citizens of the United States." The additional words "insofar as may be practicable" were deleted by the *Merchant Ship Sales Act of 1946* thus making it abundantly clear that the legislative intent as carried in the Declaration of Policy by Congress was to have the merchant marine cease to be sovereign owned and operated, and to be completely privately owned and operated.

So intent was Congress upon making certain that its new Declaration of Policy would become effective, without hindrance or question, that Congress incorporated in the same statute (46 U. S. C. Sec. 1117) the express proviso that all necessary expenditures must be allowed notwithstanding any existing statutory provisions to the contrary. Thus, the express intention of the new policy was to override all contrary or impeding existing statutes. There cannot be any doubt that the intention was to override the Suits in Admiralty Act in whatever respect that Act might impede the consummation of the new policy.

Further on in the same statute (*Merchant Marine Act of 1936*, Sec. 713, 46 U. S. C. 1203) the United States, upon entering into the contracts, was to conduct itself according to the standards of a prudent business man. Why prudent? It would scarcely be necessary for Congress to de-

mand that the United States be prudent if upon entering into the contracts the United States were still possessed of all its sovereign safe-guards, privileges and immunities. A sovereign, ensconced behind the bulwarks of immunities, has no occasion to practice prudence. But shorn of his sovereign privileges and safe-guards, he needs to be cautioned to exercise prudence. Immunity begets imprudence. When immunity ceases—when protection ends—prudence must step in. When insurance stops, caution begins. It was the palpable intent of the legislature in enacting the said statutes to strip the United States of its sovereign advantages and characteristics.

Then also the *Merchant Ship Sales Act of 1946* (Title 50 U. S. C. App. Sec. 1738(c)) made the provisions of the *Merchant Marine Act of 1936* applicable to charters executed under the *Merchant Ship Sales Act of 1946*. Further, under Title 50 U. S. C. App. Sec. 1745(d) the express provisions of the *Merchant Marine Act of 1936*, particularly 49 Stat. 1985 Sec. 207, now 46 U. S. C. Sec. 1117, which required the United States to make the chartering contracts in the manner of a private corporation, were made applicable to all activities and functions which the United States performs under the *Merchant Ship Sales Act of 1946*.

It is most significant to note that nowhere in the *Merchant Ship Sales Act of 1946* did Congress make a single reference to the sovereign statute known as the *Suits in Admiralty Act*, nor did Congress make any of the provisions of that sovereign statute applicable to the chartering contracts made under the *Merchant Ship Sales Act of 1946*. Any such reference would have been utterly inconsistent with the new policy in the law which Congress was proclaiming. The very fact that in the *Merchant Ship Sales Act of 1946*, which prescribed all the requirements

for the making of the chartering contracts, there are repeated references to and inclusions of sections of the *Merchant Marine Act of 1936* and none whatever to the *Suits in Admiralty Act*, is proof in itself that Congress had no intention of making the sovereign provisions of the *Suits in Admiralty Act* applicable to the chartering contracts made under the *Merchant Ship Sales Act of 1946*. The inclusion of one is the exclusion of the other.

The change of policy in the law was to get away from sovereign ownership and operation of merchant vessels and to make the merchant marine entirely privately owned and operated. To accomplish that purpose Congress made the United States discard its cloak of sovereignty and step down to the level of the private citizen, who was to own and operate the merchant marine, and the United States was to make the chartering contracts with him in the manner of a private corporation. By so doing the United States renounced the sovereign immunities and advantages which were bestowed upon the United States by the *Suits in Admiralty Act*. That sovereign statute could no longer be operative, and its two-year statute of limitations could not be invoked with respect to the chartering contract which Sword Line, Inc. made with the United States, the latter acting in the manner of a private corporation.

The change in the policy of the law was entirely overlooked and ignored in the adjudications heretofore made in admiralty with respect to the contract between Sword Line, Inc. and the United States. Under such change of policy it is inconceivable that admiralty could have any jurisdiction over the subject matter. The change of policy in the law should not have been ignored.

In the case of *Johnson* v. *United States*, 163 Fed. 30, 32, Justice Holmes sitting as a Circuit Justice in the Circuit Court of Appeals for the 1st Circuit stated as follows:

> "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

In *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, 350, Justice Cardozo stated:

> "it would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system. 'The Legislature has power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.' Its intimation is clear enough in the statutes now before us that their effects shall not be stifled, without the warrant of clear necessity, by the perpetuation of a policy which now has had its day."

3. *The decision in Sword Line, Inc.* v. *United States, 351 U. S. 976, has been looked upon as a leading case and cited by many courts as a precedent which courts are compelled to heed. The decision is a departure from the accepted and usual course of judicial proceedings. A decision of such moment should be unassailably correct and just, and if it be not so, the situation should be rectified.*

The Supreme Court rendered the said decision in the following few words:

> "On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit, *Per Curiam*: Certiorari is granted, limited to the question of whether admiralty had jurisdiction over the controversy stated in the libel, and the judgment is affirmed. The libel though dependent on a statute alleges unjust enrichment from a maritime contract. *Archawski* v. *Hanioti*, 350 U. S. 532. *Affirmed.*"

A. *There is No Authority for That Decision.*

A careful reading of the case of *Archawski* v. *Hanioti*, 350 U. S. 532, discloses that said case is no authority for the *Sword Line* decision. The essence of the decision in the *Hanioti* case, set forth on page 536, is as follows:

> "It is sufficient this day to hold that admiralty has jurisdiction, * * * provided that the unjust enrichment arose as a result of the breach of a maritime contract. Such is the case here."

But such is not the case in *Sword Line, Inc.* v. *United States* because there was no breach of the maritime contract in that case.

With respect to maritime contracts it has been the law in the United States for many, many years that admiralty jurisdiction does not attach unless and until there is a breach of the maritime contract. The *Sword Line* decision is a departure from that rule. In many of the court decisions there has been much discussion about quasi-contract —a fiction which has no fit and proper place in jurisprudence—but in all the decisions of the past a simple pattern has always been followed by the Supreme Court of the United States, as well as by all the lower courts, namely,

where there is a breach of the maritime contract the jurisdiction is in admiralty, and where there is no breach of the maritime contract the jurisdiction lies elsewhere than in admiralty. The courts have not enunciated the rule in so many words, but the decisions have always conformed to the said pattern. Many words were wasted in learned and irrelevant discussions about "quasi-contract" and "unjust enrichment" but the ultimate decisions always followed the said simple pattern.

While the courts have not set forth the rule in any express words, support may be found for the simple formula in *Poor*, "Charter Parties and Ocean Bills of Lading", Third edition, 1948, at page 77, where the author says:

> "Once breach of contract of affreightment is established admiralty jurisdiction attaches. But the breach must be in respect to a term not severable from the principal subject matter of the agreement."

According to said author, not only must there be a breach, but it must be a breach of a certain kind, before admiralty jurisdiction attaches. In *Archawski* v. *Hanioti* there was a very definite breach of the maritime contract as a result of which the unjust enrichment arose, and this Court held rightly that admiralty has the jurisdiction.

In the *Sword Line* case, however, there was no breach at all of the maritime contract. On the contrary, both parties to the contract performed it, in full compliance with its terms. There was nothing to even start admiralty jurisdiction on its way. Yet this Court points to *Archawski* v. *Hanioti*, 350 U. S. 352, as showing the way. To be sure, on page 535 of the *Hanioti* case, the statement is found:

> "We conclude that, so long as the claim asserted arises out of a maritime contract, the admiralty court has jurisdiction over it."

But that remark was extra judicial and not essential to the *Hanioti* decision.* This Court's decision in the *Hanioti* case was set forth on page 536, and there it was clearly ruled that the unjust enrichment must arise as a result of the *breach* of the maritime contract before admiralty can have jurisdiction. This Court concluded its opinion with the words: "Such is the case here."

If the *Sword Line* decision is to be regarded as a leading precedent it should stand on a firmer basis than the *Hanioti* case with which the *Sword Line* decision is at odds. The ruling in the *Hanioti* case is that admiralty jurisdiction attaches when there is a breach of the maritime contract. The *Sword Line* decision is a departure from that rule. There is no just reason for such departure, which in itself leads to injustice.

B: *The Libel Was Incorrectly Viewed.*

The decision in *Sword Line, Inc.* v. *United States*, 351 U. S. 976, says that the libel "alleges unjust enrichment from a maritime contract." In the Court of Claims petitioner annexed a copy of the said libel to plaintiff's objections to defendant's motion (R. pp. 58 to 66) so that the Court of Claims could see for itself that the libel did not allege what the Supreme Court had said it alleges, but the Judges of the Court of Claims took the position that the petitioner was asking too much of them to pass upon

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*In the case of *Hans* v. *Louisiana*, 134 U. S. 1, 20, Mr. Justice Bradley stated:

> "It must be conceded that the last observation of Chief Justice Marshall does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense *extra judicial*, and although made by one who seldom used words without reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion."

the correctness of any statements made by the Supreme Court.

It is very apparent that the libel referred to (R. pp. 58 to 66) did not allege "unjust enrichment from a maritime contract." It could not allege any such thing unless it alleged a breach of contract, but it alleges no such breach. Nor can any such allegation be implied on the theory that it was a breach of contract for the United States to demand and receive more charter hire than that stipulated in the contract. The amount demanded and received by the United States was exactly the amount stipulated in the contract. The libel will not support any such theory of breach of contract. The libel simply does not allege "unjust enrichment from a maritime contract."

The libel alleges that the libellant agreed to pay, and was required by the contract to pay, an amount which the statute makes wrongful because it is in excess of the amount fixed by law. There is no cause of action on the contract because there is no breach of the contract, express or implied. There is a cause of action against the United States for unjust enrichment which arose as a result of the breach of a statute, over which the Court of Claims alone can have jurisdiction.

An adjudication of the Supreme Court which erroneously interprets a pleading should not endure as a binding precedent beyond challenge by all the other courts of the land.

C. *Just and Unjust Enrichment.*

The decision in *Sword Line, Inc.* v. *United States*, 351 U. S. 976, says "The libel though dependent on a statut alleges unjust enrichment from a maritime contract."

How can the enrichment from a contract be unjust unless there is a breach of the contract? A contract agreed

to in every respect by the parties who made it, and fully performed by both parties with respect to all its terms, is a just consummation of the transaction. Both sides got what they agreed to, and both parties lived up to their covenants and promises. Neither party can have a cause of action against the other for breach of the contract, and consequently neither party can have a cause of action against the other for unjust enrichment from the contract. The enrichment from the contract is just, because each party fulfilled all its obligations. It cannot be unjust.

In the case at bar the enrichment, for which the plaintiff seeks a refund, is unjust, but it did not arise as a result of the breach of the contract. It arose as a result of the breach of a statute. The enrichment from the contract was just; the enrichment from violation of law was unjust.

In the *Hanioti* case the enrichment arose as a result of a breach of the contract by Hanioti, which made the enrichment from the contract unjust. If there had been no breach of contract by Hanioti his enrichment would not have been unjust.

There must be a breach of contract before the enrichment from it can be unjust. Also, as previously shown, there must be a breach of a maritime contract before admiralty jurisdiction attaches.

An adjudication which permits admiralty jurisdiction to attach without the breach of a maritime contract, and which finds enrichment from a maritime contract to be unjust without the breach of the maritime contract, is twofold in error and should not stand as a leading case or as a binding precedent. Add to that the fact, as heretofore shown, that the Court acted without jurisdiction of the subject matter, the adjudication becomes thrice vulnerable to attack as a leading case and guiding precedent. It should not stand.

4. *The Suits in Admiralty Act should not be tortured into an all inclusive grant of jurisdiction to the District Courts. The withdrawal from the Court of Claims of jurisdiction over the case at bar, and over kindred cases, is not just.*

In the notice of motion to dismiss the petition for lack of jurisdiction of the Court of Claims over the subject matter (R. p. 15), the defendant relies on the case of *Calmar SS Corp.* v. *United States of America*, 345 U. S. 446. In footnote #8 to that case Mr. Justice Frankfurter said:

> "It is not our task, of course, to torture the Suits in Admiralty and Public Vessels Acts into an all inclusive grant of jurisdiction to the District Courts. But equivocal language should be construed so as to secure the most harmonious results."

Congress' Declaration of Policy in the *Merchant Ship Sales Act of 1946*, in keeping with which the contract at bar was made, is unequivocal. The language is clear beyond conjecture that henceforth, after 1946, the United States merchant marine will be privately owned and operated. The inclusion of the provisions of the *Merchant Marine Act of 1936*, making it mandatory for the United States to make the contract in the manner of a private corporation (46 U. S. C. Sec. 1117, 50 U. S. C. App. 1745(d)), was deliberate. Equally deliberate and intentional was the deletion in the *Merchant Ship Sales Act of 1946* (50 U. S. C. App. Sec. 1735(a)) of the words "insofar as may be practicable" which had been contained in the *Merchant Marine Act of 1936* (46 U. S. C. Sec. 1101) thus putting it beyond the shadow of a doubt that the merchant marine subject matter of the contracts to be made under the *Merchant Ship Sales Act of 1946*, was to be exclusively

citizen owned and operated and that the sovereignty of the United States would be foreign to the transactions. The Declaration of Policy by Congress in the *Merchant Ship Sales Act of 1946*, and its intent to eliminate the element of sovereignty from the contracts to be made thereunder is supported by the fact that there were express inclusions of provisions of the *Merchant Marine Act of 1936* and no references whatsoever to the *Suits in Admiralty Act*. The *Merchant Marine Act of 1936* and the *Merchant Ship Sales Act of 1946* are a disavowal of sovereignty; the *Suits in Admiralty Act* is an assertion of sovereignty. *Expressio unius est exclusio alterius.* The *Suits in Admiralty Act*, with its sovereign characteristics, has no application to the contract at bar and is inoperative with respect to it.

Quite obviously, also, does it result from such Declaration of Policy by Congress that the ruling made in *Johnson v. Fleet Corporation*, 280 U. S. 320, relied upon by the defendant in its motion to dismiss (R. p. 15), cannot apply to the cause at bar. At page 327 of that case this Court stated:

> "We conclude that the remedies given by the (Suits in Admiralty) Act are exclusive in all cases where a libel might be filed under it."

When the United States assumes the role of a private corporation it ceases to be a sovereign and no libel can be filed against it under the sovereign *Suits in Admiralty Act*.

It is the policy of the law that there should be an end to litigation, and under ordinary circumstances a ruling by the highest court in the land brings such an end—but only if jurisdiction of the subject matter has been looked into in all its aspects and found to exist. A litigation can hardly be fittingly brought to an end by granting

certiorari on the question of jurisdiction and then closing the door to a hearing on that very question.

Of course there should be an end to litigation; but that does not mean that a litigation can terminate in an adjudication which evidences utter disregard for the legislative policy and mandate indelibly inscribed in the *Merchant Ship Sales Act of 1946*, directing the contracts to be made by the United States in the manner of a private corporation, thereby nullifying the efficacy of the *Suits in Admiralty Act* with its sovereign characteristics and its sovereign immunity of a two-year statute of limitations as against a six-year statute for a private corporation, and which *Suits in Admiralty Act* by its very language cannot apply to a privately owned or operated merchant marine. Legislative policy must be observed. The *Suits in Admiralty Act* cannot be tortured into overriding a new legislative policy enacted and proclaimed twenty years later with the obvious intent of superseding it.

The evils wrought by the void adjudication of *Sword Line, Inc.* v. *United States*, 351 U. S. 976, have reached gigantic magnitudes. The amount which Sword Line, Inc. has lost by reason of the void ruling is $1,727,253.28 together with interest. There are at least a hundred other citizen corporations having similar claims totaling easily more than $100,000,000, and they have been told that their claims are dismissed on the authority of *Sword Line, Inc.* v. *United States*, 351 U. S. 976, which patently gave no consideration to the legislative policy mandate which put the case beyond the reach of admiralty jurisdiction. The invalid ruling has been cited as controlling in all the other kindred cases thus bringing to the citizens a wrongful and unjust loss of over $100,000,000. (See, *e.g.*, *Smith-Johnson S. S. Co.* v. *United States*, 142 F. Supp. 367, dismissed on the authority of the said invalid ruling, and certiorari denied, 352 U. S. 895, 77 Supreme Ct. Repr. 127.)

The door to any relief from the palpable injustice is closed to the citizens because the void ruling is by the court of last resort. Even the lower courts—all courts of original jurisdiction—do not dare to voice any disagreement with the void adjudication because they do not deem it their place to pass upon the correctness or validity of a ruling by the highest court in the land. They consider themselves bound like puppets to follow the ruling—right or wrong. It is a well merited reproach to our jurisprudence when judges, who are elevated to the bench to do justice, find themselves stifled and hog-tied by a void ruling of the highest court, upon which they dare not even to make any comment.

Even if the ruling were not void, it is difficult to understand it. It is based upon *Archawski* v. *Hanioti*, 350 U. S. 532, in which this Court said "The problem is to prevent unjust enrichment from a maritime contract." Enrichment which is unjust should always be prevented, regardless of whether it results from a breach of contract of any kind or from a violation of law. In the cited case Hanioti, "the unbelievable scoundrel", enriched himself by $130,000 through a breach of contract and this Court rightly prevented the enrichment by making a valid finding of admiralty jurisdiction. In the *Sword Line* case, however, the United States enriched itself by $1,727,253.28, not through a breach of contract but through a violation of law, and this Court, instead of preventing the unjust enrichment (which was the problem), approved it by making a void finding of admiralty jurisdiction. On its face there is inequality in the rulings. A court cannot rule one way when the defendant is Hanioti and another way when the defendant is the United States. Admiralty restrained leads to injustice.

Finally, there is no just ground for depriving the Court of Claims of the jurisdiction which it has over the subject matter of the case at bar. As a ground for taking such

jurisdiction from the Court of Claims the notice of motion (R. p. 15) of the defendant cites the case of *Calmar S. S. Corp.* v. *United States*, 345 U. S. 446, 455, where this Court said:

> "* * * Yet the district courts are in our judicial system the accustomed forum in matters of admiralty; everything else being equal, no efforts should be made to divert this type of litigation to judges less experienced in admiralty."

One needs only to embark into the practice of admiralty to discover how utterly helpless many of the district judges are in functioning in the field of admiralty. By far, the great majority of judges appointed to the district courts never had any knowledge or experience in admiralty prior to the time of their appointment to the bench. Nor has experience in admiralty ever been regarded as a prerequisite to the appointment of a district judge, and after some years of service on the bench many of the district judges have only a meager knowledge of admiralty. Moreover, litigants have no privilege of designating or choosing an experienced judge before whom they would prefer to litigate their suit in admiralty, and the instances are innumerable in which admiralty lawyers are hampered and have to struggle before a judge with little knowledge of the subject. To obtain justice in admiralty frequently necessitates an appeal, but where the expense of printing a voluminous record is prohibitive the result often is an unsatisfactory and unjust settlement. Moreover, judges of the district courts do not sit *in banc* nor do they act combinedly nor in conference in the adjudication of cases. Each judge is appointed in his individual capacity and each judge administers the law according to his individual thinking and without collaboration or consultation with the other district judges. There is hardly an admiralty

lawyer in practice who would not prefer to litigate his case simultaneously before five well-seasoned judges sitting *in banc* in the Court of Claims, with perhaps a little less opportunity for experience in admiralty cases, rather than before a single district judge who may have only a fragment of experience in the subject, but who happens to sit in an accustomed forum for admiralty cases, which forum is also occupied in the main with cases other than in admiralty.

In the case at bar, however, it is not a matter of "everything else being equal" as was indicated in the *Calmar* case, *supra*. The sovereign *Suits in Admiralty Act* has no application to the case, by virtue of the mandate and Declaration of Policy, whereby sovereignty was eliminated. Accordingly, the reason for withdrawing the jurisdiction from the Court of Claims has been eliminated. In matters in which the United States acts as a private corporation no jurisdiction was ever withdrawn from the Court of Claims; it was done only in cases where the United States acts as a sovereign.

Conclusion

Viewing all the circumstances and factors surrounding the void adjudication by the court of last resort the matter resembles irreversible injustice under authoritarian edict. It is not "equal justice under law". Certiorari should be granted.

Dated, New York, N. Y., August, 1957.

Respectfully submitted,

THEODORE J. BREITWIESER,
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IN THE

Supreme Court of the United States

October Term, 1957

No. 345

SWORD LINE, INC.,
Plaintiff-Petitioner,

v.

UNITED STATES OF AMERICA,
Defendant.

REPLY BRIEF FOR PLAINTIFF-PETITIONER

THEODORE J. BREITWIESER,
Counsel for Plaintiff-Petitioner.

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OCTOBER TERM, 1957

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SWORD LINE, INC.,
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Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR PLAINTIFF-PETITIONER

Argument

1. The Petitioner has not had its day in Court. Res judicata cannot be urged.

In its concluding paragraph, the brief for the Government in opposition to the petition for a writ of certiorari says:

> "Petitioner has had its day in court on the question of jurisdiction over the subject matter of its claim, and the Court of Claims properly dismissed

the complaint on the authority of the final decision rendered by this Court on petitioner's previous petition for certiorari."

In the Court of Claims the basis for the Government's motion to dismiss the complaint was the Supreme Court's decision on the petitioner's previous petition in *Sword Line, Inc.* v. *United States*, 351 U. S. 976 (Government's Brief in Opposition, p. 4).

But this Court's decision in *Sword Line, Inc.* v. *United States*, 351 U. S. 976, granted the petition for certiorari on the question of jurisdiction and simultaneously closed the door to argument on that question. The petitioner was foreclosed from a hearing on the very question of jurisdiction on which, among others, it sought certiorari; and accordingly, the petitioner has not had its day in Court on the question of jurisdiction over the subject matter, any statement by the opposition to the contrary notwithstanding.

In support of its statement to the contrary the Government cites the case of *Stoll* v. *Gottlieb*, 305 U. S. 165, which authority at page 172 says:

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. *After a party has had his day in court, with opportunity to present his evidence and his view of the law*, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." (Emphasis supplied.)

When certiorari was granted on the question of jurisdiction but argument thereon was foreclosed, *the petitioner had no opportunity to present its view of the law on that question.* There was missing the essential elementary prerequisite, as laid down by *Stoll* v. *Gottlieb, supra,* and consequently it cannot be said that the petitioner has had its day in court.

Of course it is important that there should be a place to end litigation, but as was said in *Stoll* v. *Gottlieb, supra,* that place cannot be reached until "*after a party has had his day in court with opportunity to present his evidence and his view of the law.*" Until such opportunity has been afforded, the litigation has not properly ended, and the earlier decision as to jurisdiction is open to collateral attack. On such collateral attack it will not be a retrial of the issue, because the issue was not tried in the first place. In *Sword Line, Inc.* v. *United States,* 351 U. S. 976, the issue of jurisdiction was not tried because the petitioner had no opportunity to present its evidence or its view of the law. The decision is not *res judicata.*

2. Where a strict jurisdictional fact is absent, admiralty cannot take jurisdiction. To do otherwise, is usurpation of jurisdiction.

In its brief in opposition the Government states erroneously that in *Krauss Bros. Lumber Co.* v. *Dimon S.S. Corp.,* 290 U. S. 117, this court held that a claim to recover excess freight charges is enforceable in admiralty. Such was not the holding. What this Court held in the *Krauss* case was that where freight charges exceed the stipulated amount agreed upon in the maritime contract they constitute a *breach* of the maritime contract, which is the strict jurisdictional fact which gives admiralty the jurisdiction.

What the Government ignores is the statement in this Court's decision in the *Krauss* case, written by Mr. Justice Stone, in which he says at page 124:

> "Even under the common law form of action for money had and received there could be no recovery without proof of the breach of contract involved in demanding the payment, and the basis there, as in admiralty, is the violation of some term of the contract of affreightment."

The strict jurisdictional prerequisite fact for admiralty jurisdiction is the breach of the maritime contract. Where there is no breach there is no admiralty jurisdiction and none can be usurped. In *Sword Line, Inc.* v. *United States*, 351 U. S. 976, there was no breach of the maritime contract, and consequently the final adjudication giving admiralty the jurisdiction is void because the strict jurisdictional fact is absent, and the adjudication is therefore subject to collateral attack.

Admiralty jurisdiction is not dependent on any statute. For twenty centuries it has been inherent in the law of admiralty that where there is a maritime contract, coupled with a breach thereof, admiralty has the jurisdiction; without a breach of the maritime contract the jurisdiction is elsewhere than in admiralty. Such is the clear import of the words of Mr. Justice Stone in *Krauss Bros. Lumber Co.* v. *Dimon S.S. Corp.*, *supra*. The *breach* of a maritime contract is the strict jurisdictional fact which must be present to give admiralty jurisdiction. Without such strict jurisdictional fact an adjudication in admiralty is a nullity.

In addition to the jurisdiction of admiralty resulting from a breach of a maritime contract, admiralty has also had, from time immemorial, inherent jurisdiction over certain specialties such as salvage, jettison, general average, and

in rem proceedings generally, not arising out of any contract, but such inherent jurisdiction over specialties does not alter the basic strict jurisdictional requirement of the existence of a *breach* of a maritime contract before admiralty jurisdiction can attach in maritime contract cases.

3. In the case at bar the Suits in Admiralty Act is not the jurisdictional statute.

On page 5 of its brief in opposition the Government says that the District Court had "the duty to interpret the language of the jurisdictional statute, here the Suits in Admiralty Act".

The cause in the case at bar is concerned with the *Merchant Ship Sales Act of 1946* which embraced in its terms the *Merchant Marine Act of 1936*, both of which statutes were enacted by Congress with a Declaration of Policy that the Government would deal with its citizens in the manner of a private corporation, and not any longer in the manner of a sovereign as the *Suits in Admiralty Act of 1920* required when the latter was enacted. The *Merchant Ship Sales Act of 1946*, by virtue of such Declaration of Policy, superseded the *Suits in Admiralty Act of 1920*, so much so that the latter could no longer be applied to issues and causes arising under the Declaration of Policy of 1946. Under the Congressional intent so obviously expressed in the *Merchant Ship Sales Act of 1946*, the *Suits in Admiralty Act of 1920* has become obsolete and outmoded.

Likewise the decisions of this Court, to which the Government refers on page 4 of its opposing brief, namely, *Johnson* v. *Fleet Corporation* (1930), 280 U. S. 320, and *Matson Navigation Co.* v. *United States* (1932), 284 U. S. 352, which decisions concerned themselves with ascertaining the intent of Congress, as it was expressed in 1920,

are no longer applicable in dealing with situations arising out of the completely changed intent of Congress as expressed by it in 1946 in its Declaration of Policy enacted in the *Merchant Ship Sales Act of 1946.*

The outmoded and superseded *Suits in Admiralty Act* cannot be applied to the cause of action at bar. It is not the jurisdictional statute.

4. A Null and Void adjudication cannot be a guiding precedent for future decisions.

The Government's brief in opposition at pages 3 and 4 refers to three cases which have been adjudicated since the decision of *Sword Line, Inc.* v. *United States*, 351 U. S. 976. The three cases involved the rights of steamship companies, named respectively American Eastern Corp., Smith-Johnson Corp. and Marine Transport Lines, Inc., and in each of the three decisions the null and void adjudication of *Sword Line, Inc.* v. *United States*, 351 U. S. 976, was specifically set up as a ruling case and it was followed as a controlling precedent. The entire shipping industry of the nation, comprising a thousand steamship companies, is being victimized by the Government through the unjust enrichment of the latter to the extent of over a hundred million dollars only because the steamship companies were lured into believing that Congress meant what it said in 1946, namely, that henceforth the Government would contract in the manner of a private corporation. Little did the companies expect, after entering into the contracts, that their Government would turn turtle, resume its sovereign status, exhume the discarded *Suits in Admiralty Act* and wield its outmoded overpowering bludgeon against them. A void adjudication, which permits and encourages such results, should be expunged.

Conclusion

In *Archawski* v. *Hanioti*, 350 U. S. 532, the strict jurisdictional fact, namely, a breach of the maritime contract, was present, wherefore admiralty had jurisdiction. In *Sword Line, Inc.* v. *United States*, 351 U. S. 976, the same strict jurisdictional fact was absent, and its absence makes the decision a nullity, and therefore open to collateral attack.

In *Sword Line, Inc.* v. *United States*, 351 U. S. 976, the court of last resort granted certiorari on the question of jurisdiction but simultaneously sealed the door to a hearing thereon. The opportunity to litigate was foreclosed. If that be *res judicata* then we really will have irreversible injustice by judicial fiat. Certiorari should be granted.

Dated, New York, September, 1957.

Respectfully submitted,

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No. 345

In the Supreme Court of the United States

OCTOBER TERM, 1957

SWORD LINE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The Court of Claims entered its judgment without opinion. Its order stated that "on the authority of *Sword Line, Inc.* v. *United States*, 351 U. S. 976, * * * defendant's motion to dismiss be and the same is granted and plaintiff's petition is dismissed" (R. 81).

JURISDICTION

The judgment of the Court of Claims was entered on May 17, 1957. The petition for a writ of certiorari was filed on August 6, 1957. The jurisdiction of this Court can be invoked only under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether the Court of Claims properly dismissed petitioner's action below on the authority of this Court's decision in *Sword Line, Inc.* v. *United States*, 351 U. S. 976.

STATEMENT

This is the second time petitioner has requested this Court to review the jurisdictional issue presented by this case. See No. 861, October Term, 1955, certiorari granted and admiralty jurisdiction affirmed, 351 U. S. 976.

Petitioner originally filed a libel in the District Court for the Southern District of New York under the Suits in Admiralty Act, 46 U. S. C. 741–752, alleging that it chartered from the United States certain war-built vessels under the Merchant Ship Sales Act of 1946, and the Merchant Marine Act of 1936, and that it was overcharged because the charter hire had been computed in violation of statutory directions. The United States raised two points in answer to the libel—first, that the libel had been filed more than two years after the cause of action arose and was thus time-barred, and second, that it was also barred by a release and compromise with the Government pursuant to an arrangement under the Bankruptcy Act, 11 U. S. C. 701, *et seq.* The District Court ruled that this arrangement constituted a bar to the libel and dismissed it. *Sword Line, Inc.* v. *United States*, 134 F. Supp. 631 (S. D. N. Y.).

On appeal, the Court of Appeals for the Second Circuit affirmed, ruling that the District Court had

jurisdiction in admiralty over the controversy, that the claim was time-barred, and that it was also barred by the release and compromise with the Government. *Sword Line, Inc.* v. *United States*, 228 F. 2d 344 (C. A. 2). Petitioner, which had originally invoked admiralty jurisdiction, then moved for rehearing on the precise contention raised in this petition, namely, that admiralty lacked jurisdiction over the subject matter of its claim. On rehearing, the Court of Appeals, directing itself primarily to the jurisdictional issue posed, affirmed its earlier decision that the District Court had jurisdiction over the subject matter of the libel and that the libel was barred both by the statute of limitations and the release and compromise. *Sword Line, Inc.* v. *United States*, 230 F. 2d 75 (C. A. 2).

Thereafter, petitioner filed with this Court a petition for writ of certiorari to the Court of Appeals for the Second Circuit. This Court, on June 11, 1956, granted the petition and disposed of the controversy with the following *per curiam* decision (351 U. S. 976):

> Certiorari is granted, limited to the question whether admiralty had jurisdiction over the controversy stated in the libel, and the judgment is affirmed. The libel, though dependent on a statute, alleges unjust enrichment from a maritime contract. *Archawski* v. *Hanioti*, 350 U. S. 532. Affirmed.

Prior to this June 11 decision of this Court, petitioner on January 9, 1956, brought suit in the Court of Claims asserting a cause of action identical with

that set forth in the libel in the District Court (R. 1–11). The Government moved to dismiss (R. 13), and on the authority of this Court's decision in *Sword Line, Inc.* v. *United States*, 351 U. S. 976, the Court of Claims granted the Government's motion on May 17, 1957.

ARGUMENT

1. This petition for certiorari represents no more than an attempt to obtain reconsideration of a controversy heretofore correctly and conclusively determined by this Court against petitioner. The decision in *Sword Line, Inc.* v. *United States*, 351 U. S. 976, holding that admiralty has jurisdiction over an action seeking recovery on an alleged overpayment of charter hire, merely constitutes the reaffirmance of the rule of *Krauss Bros. Lumber Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117, which held that a claim to recover excessive freight charges gives rise to a maritime lien and is enforceable in admiralty.[1] Similarly, the rule that the remedy provided by the Suits in Admiralty Act is exclusive has been firmly established by this Court. *Johnson* v. *Fleet Corporation*, 280 U. S. 320, 327; *Matson Navigation Co.* v. *United States*, 284 U. S. 352, 356; and see *Calmar S. S. Corp.* v. *United States*, 345 U. S. 446. Subsequent to its *Sword Line* decision, this Court has denied several petitions for certiorari presenting the same question. *American Eastern Corp.* v. *United States*, 231 F. 2d 664 (C. A. 2), certiorari denied, 351 U. S. 983; *Smith-*

[1] See also *Archawski* v. *Hanioti*, 350 U. S. 532, the direct authority relied on by this Court in the *Sword Line* decision.

Johnson Steamship Corp. v. *United States,* 142 F. Supp. 367 (C. Cls.), certiorari denied, 352 U. S. 895; *Marine Transport Lines, Inc., et al.* v. *United States,* 146 F. Supp. 222 (C. Cls.), certiorari denied, 352 U. S. 935.

2. Moreover, the decision in *Sword Line, Inc.* v. *United States,* 351 U. S. 976, involving the same parties, the same claim, and the identical jurisdictional question, is clearly *res judicata*. *Stoll* v. *Gottlieb,* 305 U. S. 165; *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371; see also *Commissioner* v. *Sunnen,* 333 U. S. 591; *Heiser* v. *Woodruff,* 327 U. S. 726; *Sherrer* v. *Sherrer,* 334 U. S. 343; *Partmar Corp.* v. *Paramount Corp.,* 347 U. S. 89. In asserting that the earlier decision of this Court was void and invalid because there was no original admiralty jurisdiction of the subject matter, petitioner ignores the fact that the District Court had not only the power but also the duty to interpret the language of the jurisdictional statute, here the Suits in Admiralty Act, and its application to an issue before the court. *Stoll* v. *Gottlieb,* 305 U. S. 165, 171. And where a federal court, either the appellate court or the court of the first instance if no appeal is taken, has decided the question of jurisdiction over the parties or subject matter as a contested issue, its judgment is *res judicata* and permits no further inquiry into the jurisdictional question. *Stoll* v. *Gottlieb, supra,* at 172. Even if the court errs in entertaining jurisdiction, its determination of the question is conclusive upon the parties before it and not subject to collateral attack.

Stoll v. *Gottlieb*, *supra*, at 175; *Dowell* v. *Applegate*, 152 U. S. 327.

Petitioner has had its day in court on the question of jurisdiction over the subject matter of its claim, and the Court of Claims properly dismissed the complaint on the authority of the final decision rendered by this Court on petitioner's previous petition for certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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